Supreme Court, U.S.
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No. 97-440

In The

Supreme Court of the United States

October Term, 1996

D.R., by his parents and legal guardians, M.R. and B.R.,

Petitioner,

vs.

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Third Circuit erred in holding that a binding and enforceable settlement agreement voluntarily entered into by parents and a board of education to resolve a dispute concerning the educational placement of a learning disabled youngster may not be set aside by parents of the disabled youngster under circumstances where the agreement was valid and in accordance with the Individuals with Disabilities Education Act ("IDEA") at the time that it was entered and there was no change in the youngster's educational circumstances subsequent to the entry of the settlement?

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The East Brunswick Board of Education submits this opposition to the Petition for Writ of Certiorari filed by D.R. and his parents, M.R. and B.R.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). Such section, however, grants jurisdiction only over questions 1 and 2 presented by Petitioner, and not over question 3, as question 3 was not an issue before the Third Circuit. Specifically, Petitioner seeks review of the judgment of the Court of Appeals for the Third Circuit entered on March 26, 1997. Petitioner's question presented #3 seeks review of the question of whether the settlement agreement which was entered between the parties compelled, by its terms, that D.R.'s parents bear the additional costs of the personal aides which were assigned to D.R. by the Benedictine School. It is respectfully submitted that this question was not an issue presented for the Third Circuit's determination and, as a result, is not a proper issue for review of the Third Circuit's decision.

The question of whether or not the terms of the settlement entered into between the parties required that the parents pay for the aides assigned to D.R. was a question that was determined by the United States District Court for the District of New Jersey in *D.R. v. East Brunswick Board of Education*, 838 F. Supp. 184 (D. N.J. 1993) on appeal from an OAL decision in this matter in *D.R. v. East Brunswick Board of Education*, OAL Docket No. EDS 10062-92, decided January 19, 1993. (PA.23) Specifically, in *D.R. v. East Brunswick Board of Education*, 838 F. Supp. 184 (D. N.J. 1993), it was held that the settlement agreement entered into by the parties in this matter required that the parents pay for the costs of the additional aides which were required by Benedictine. (PA.27) This decision was never appealed to the Third Circuit.

Instead, as admitted by Petitioner's Statement of the Case, the matter was remanded back to the OAL, under *D.R. v. East Brunswick Board of Education*, OAL Docket No. EDS 12199-93, for a determination of whether D.R.'s circumstances had changed such that the settlement agreement should be set aside. (PA.39) Notably, the federal district court's holding on the issue of the interpretation of the terms of the settlement agreement was not an issue on remand. (PA.37-PA.38; RA.7a) Parents then filed an appeal of the OAL's decision on remand under *D.R. v. East Brunswick Board of Education*, Civil Action No. 94-4167, decided August 4, 1995. (PA.43) Again, the issue of the interpretation and/or construction of the settlement agreement was not an issue before the court. It was from this decision that the appeal was taken to the Third Circuit. (PA.1) In sum, the issue of the construction and interpretation of the settlement agreement was not an issue on appeal before the Third Circuit and, as a review is sought from this decision only, the issue is not a proper question for review by this Court.

Only cases in a court of appeals may be reviewed by the Supreme Court by writ of certiorari. 28 U.S.C. § 1254(1). If the court of appeals lacks jurisdiction over an issue, review under 28 U.S.C. § 1254 is not available. 4 Am. Jur. 2d 636; *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 76 S. Ct. 763, 767 (1956). A court of appeals has only such jurisdiction as has been granted unto it by statute. 4 Am. Jur. 2d 696; *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669, 673 (1981). Pursuant to 28 U.S.C. § 1291, a federal court of appeals has jurisdiction over final decisions of the United States district courts.

As demonstrated above, the Third Circuit only had jurisdiction to review questions decided by the district court in *D.R. v. East Brunswick Bd. of Educ.*, which was decided on August 4, 1995. (PA.40) The issue of the construction of the

settlement agreement was not an issue before the district court in that case. The issue was last before the court in *D.R. v. East Brunswick Bd. of Educ.*, 838 F. Supp. 184 (D. N.J. 1993). (PA.22) Petitioners never appealed this issue at the time such decision was rendered, and they never even brought a cross-appeal on this issue before the Third Circuit. In light of all of the foregoing, the issue is not properly reviewable by writ of certiorari.

STATEMENT OF THE CASE

The Petition in this matter has failed to set forth all of the facts which would be relevant to the Court's determination were certiorari granted and has, further, misstated facts and mischaracterized the lower court's decisions in this matter. As a result, this response will more completely and accurately set forth the facts and law which are relevant to this matter.

D.R. was born on March 22, 1974, was diagnosed with cerebral palsy at age two, and is classified as multiply handicapped. (RA.7a) From age four until age 21, D.R. had resided with his parents (hereinafter referred to as "Petitioners") in their home in East Brunswick and was placed by the East Brunswick Board of Education to receive his education in a day school known as the Cerebral Palsy Center (CPC) located in Edison, New Jersey. (RA.7a) On December 11, 1991, Petitioners filed a request for due process alleging that the district's placement at CPC was inappropriate for D.R. and that the only appropriate educational setting for D.R. was the Benedictine School, which is a residential school located in Ridgely, Maryland. (RA.9a) In January of 1992, Petitioners unilaterally and without Respondent Board's consent removed D.R. from the Board's day placement at CPC and placed him at the Benedictine School. (RA.8a)

On February 3, 1997, the parties participated in mediation

of their dispute and entered into a settlement agreement which provided that the East Brunswick Board of Education would "compensate placement costs at the Benedictine School for D.R. at an annual rate of $27,500, prorated for the balance of the 1991-92 school year including the summer of 1992 and beginning January 1, 1992," and that "for the 1992-93 school year the Board will contribute 90% of any increase over the 1991-92 rate." (RA.9a-10a) (Ra.1a)[1] The agreement also provided that "the Board will be absolved of any other or further costs based upon this placement, related services, or transportation in connection therewith." (RA.1a) In sum, the Board agreed to pay a specified amount for the payment of tuition and residential costs for the 1991-92 school year, 90% of any increase in that amount for the 1992-93 school year, and was specifically absolved of any responsibility to pay for any other costs or related services. *D.R. v. East Brunswick Bd. of Educ.*, 838 F. Supp. 184 (D.N.J. 1993) (PA.27)[2] The prior caselaw cited herein makes it clear that the settlement required that the Board pay 90% of the increase in costs for the regular Benedictine program for which the Board had been billed $27,500 in the 1991-92 school year, and absolved the Board from responsibility to pay for any additional costs such as costs for the aides for which Benedictine had billed the Board. Thus, Petitioner's characterizations that the agreement required that the Board pay for 90% of the costs of the aides is disputed, as the agreement absolved the Board from the payment of any

1. Petitioner's assertion that the Board agreed to pay $27,000 is incorrect. To the Board's knowledge, there is no evidence of record as to what the actual annual cost of the program was for the 1991-92 school year, and the Board disputes that such was $30,000.

2. In the event that this Court elects to consider Petitioner's arguments concerning the construction of the settlement agreement, the Board disputes Petitioner's mischaracterization on page 3 of his Brief in stating that "the district refused to pay 90% of this increased cost [for the aides]."

monies for the aides, pursuant to *D.R. v. East Brunswick Bd. of Educ.*, 838 F. Supp. 184 (D. N.J. 1993). (PA.27)

In April of 1992, at the direction of Petitioners and their attorney, Benedictine sent the Board a bill for the 1992-93 school year which indicated that Benedictine was assigning D.R. two personal aides to attend to D.R. during all of his waking hours. (RA.11a-12a; RA.4a) Specifically, the bill indicated charges for a special classroom aide and a special residential aide, each at a cost of $16,640, for a total cost of $33,280. (RA.4a)[3] In reliance upon the settlement agreement, the Board did not pay the bill. (RA.12a)

On July 27, 1992, Petitioner filed a second request for due process which requested that the East Brunswick Board of Education be directed to pay for the personal aides required by Benedictine. (RA.12a) On November 5, 1992, a New Jersey Administrative Law Judge, under OAL Docket No. EDS 6529-92, held that the settlement agreement was binding upon the parties and absolved the Board of Education from responsibility for the payment of the aides. (RA.14a) Instead of requesting that the Board find an appropriate placement for D.R. other than Benedictine, D.R.'s parents continued to insist that the settlement was binding upon the Board and that the placement at Benedictine continue. (RA.18a)[4] As a result, Petitioners filed a

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3. The Board disputes Petitioner's assertions that the addition of the aides increased the annual costs of the program by $30,000 to $60,000, and submits that the aides increased the annual cost of the program by $33,280.

4. Petitioners erroneously contend on page 5 of their brief that the settlement would have precluded D.R. from attending school and receiving an education if they had not paid for the aides themselves. This is a mischaracterization. Clearly, Petitioners had the option of having the district seek another appropriate placement, and D.R. could have received an appropriate education in an alternate placement had they been unable, or unwilling, to pay for the aides.

request for reconsideration seeking that the Board be required to pay for the aides. (RA.14a) The ALJ again found, by decision dated December 14, 1997, that the settlement was binding and pursuant to such, Petitioners were responsible for the payment of the aides. (RA.15a)

Petitioners did not appeal this decision. Instead, they filed yet another due process request on December 23, 1992, seeking a due process hearing on the same issues that were decided by the prior ALJ hearing. (RA.15a) The Board filed a motion to dismiss, and the case was dismissed on the grounds of res judicata by decision dated January 19, 1993. *D.R. v. East Brunswick Bd. of Educ.*, OAL Docket No. EDS 10062-92. (RA.15a)

On February 10, 1993, Petitioners filed an action in federal district court seeking to appeal the January 19, 1993 OAL decision. (PA.14) Although both parties cross-moved for summary judgment, the Honorable Alfred M. Wolin denied both cross-motions and remanded the matter back to the OAL. (PA.38-39) Specifically, the district court held that: (1) the settlement was a clear, unambiguous, valid agreement which was binding on both parties, (PA.23, 24, 27); (2) construction and interpretation of the agreement required a holding that the Board was not responsible for the payment of additional aides (PA.27); (3) the agreement could not be voided or rescinded due to mutual mistake or lack of mutual assent. (PA.29)

Most importantly, the court also found that it needed to set forth a test which would allow for the balancing of the importance of preserving the final and binding nature of settlements in special education cases with the importance of enforcing the IDEA's requirement that children receive an appropriate public education. (PA.33)[5] In order to ensure that

5. Respondent disputes Petitioner's characterization of the court's holding.

the IDEA's requirements were fulfilled, the court required that the settlement be consistent with the IDEA's requirements at the time that it was entered. (PA.33) In the interests of preserving the sanctity of settlement agreements, the court also recognized the important policy considerations in preserving the final and binding nature of settlement agreements in finding that failing to hold a settlement agreement final and binding would have a chilling effect on the use of such agreements, as parties would never know if the matter was finally resolved. (PA.23) In light of this, the court required that, in order to set aside a valid settlement, parents must meet a threshold burden by showing that there was some sort of change in the child's educational circumstances after the entry of the agreement. (PA.33; PA.38) If parents meet this burden, the agreement may be set aside under circumstances where the enforcement of such would result in the child's needs no longer being met. The court remanded the matter to the OAL for a hearing for a factual determination on this issue. (PA.39)

On remand, the following facts were set forth by the evidence presented. While D.R. was placed at the CPC, D.R.'s educational circumstances were as follows. D.R. was educated in a small self-contained classroom setting, and travelled outside of his self-contained classroom during the school day only for specified reasons and only when accompanied by staff. (RA.7a) While at CPC, D.R. could not get from one location to another without assistance, frequently engaged in "rocking" and regressive behaviors, and was in need of assistance for eating, toileting, and dressing. (RA.8a)

Upon D.R.'s initial acceptance at Benedictine, parents were informed by the Benedictine staff that his placement there was on a trial basis only which would last for five weeks. (RA.8a) From the inception of his placement at Benedictine, the Benedictine staff noticed that D.R. needed help toileting,

dressing, cleaning himself, and eating by himself. (RA.8a-9a) Petitioners were also informed that there was a possibility that Benedictine would require modifications or additions to D.R.'s educational program, and they were specifically told that due to D.R.'s problems, they may require that he have personal aides and/or additional related services to assist him. (RA.8a) Neither Petitioners nor Benedictine shared this information with the East Brunswick Board of Education. (RA.8a)

In February, the East Brunswick Child Study Team had observed D.R. in his program at Benedictine and found that Benedictine had been providing, as part of its program, related services to D.R. in that D.R. was being assisted, both in and out of the classroom, by aides provided by Benedictine. (RA.10a) It was also observed and noted that a member of Benedictine's dormitory staff had been assigned the responsibility of assuring that D.R. was properly dressed and provided toileting assistance. (RA.9a) Specifically, D.R. was in a class which was comprised of four students, two classroom aides, and one teacher. (RA.19a; Exhibit P-9)) The dorm staff had been taking care of assisting D.R. with his personal hygiene skills, and staff further reported that D.R. was making a favorable adjustment to the program. (RA.19a; Exhibit P-8; RA.19a; Exhibit P-1)

At the end of D.R.'s five week trial period in February, Benedictine again informed parents that a great deal of one-to-one assistance was being provided to D.R. by the Benedictine staff and that it may in the future require that he receive a full-time personal aide. Again, neither parents nor Benedictine informed the East Brunswick Board of Education of this determination or possibility. (RA.10a)

In March of 1992, the East Brunswick Child Study Team again observed D.R. at Benedictine, and found that, as was the case while he was placed at CPC, D.R. continued to be in need

of assistance bathing and dressing, and was unable to walk distances unsupervised. (RA.19a; Exhibit P-3) In April of 1992, at the direction of Petitioners and their attorney, Benedictine sent the East Brunswick Board of Education a bill for the 1992-93 school year which indicated that Benedictine was assigning D.R. two personal aides to attend to D.R. during all of his waking hours at an additional cost of $33,280 per year. (RA.4a) In reliance upon the settlement agreement, the Board took the position that Petitioners were responsible for the cost of the aides under the settlement agreement, and did not pay the bill. (RA.12a)

In April, Benedictine's educational director opined that D.R. was benefitting from the program which was currently being offered by Benedictine, which did not include the personal aides that Benedictine was requiring. (Transcript of OAL proceedings, pages 63 and 77) In May, D.R.'s teacher reported that he continued to need assistance with toileting and dressing, and that there was an aide that had been assigned to him by Benedictine to work with him in the classroom. (RA.19a; Exhibit P-6) Benedictine's educational director informed Petitioners in June of 1992 that D.R. could no longer attend the program on the same basis that he had been, with the Benedictine staff assisting D.R. as part of the regular program, and that Benedictine would not permit D.R. to return to their program for the 1992-93 school year if he was not accompanied by a personal aide during all of his waking hours to care for all of his needs, as he was taking time away from other students. (RA.12a)

In July of 1992, Benedictine prepared a written document called a "request for one to one aides" which stated that personal aides were needed during all waking hours because D.R. was unable to dress, groom, and toilet, and that he needed one-to-one assistance in the classroom. It was also contended that the

additional personal aides were recommended because D.R. was prone to wandering off if not watched. (RA.12a) The East Brunswick Child Study Team observed D.R. both in the classroom and the cafeteria, and opined that his behavior was appropriate, he remained with his class, and made the appropriate usage of eating utensils and ate his lunch without assistance. (RA.19a; Exhibit P-10) Benedictine's educational director further indicated, in July of 1992, that D.R. was not in need of an aide during all waking hours, and that D.R. was not in need of a personal aide in the classroom inasmuch as there were already three staff members assigned to a class of only four students. (RA.19a; Exhibit P-9) Moreover, Benedictine's educational director indicated that all related services which were educationally necessary for D.R. were included in his tuition costs as part of his regular educational program which was provided by Benedictine. (RA.19a; Exhibit P-9).

Rather than seek to have the Board place D.R. in a different educational setting, Petitioners elected to continue D.R.'s education at Benedictine and agreed to pay for the aides which Benedictine was requiring. (RA.18a) As a result, although Petitioners contend that upholding the settlement would have run afoul to the IDEA because D.R. would not have received an appropriate education had parents not agreed to pay for the aides, the facts of this matter clearly demonstrate that such is simply not the case. Had Petitioners refused to pay for the aides and Benedictine precluded D.R. from attending their program, Petitioners could have alternatively sought to have D.R. placed in a different appropriate placement at the expense of the public school system. Instead, however, they elected to insist upon their chosen program. Thus, D.R. would not have been precluded from receiving an education had his parents elected not to pay for the aides. He simply would not have returned to Benedictine due to Benedictine's refusal to educate him.

After considering all of the evidence presented by the parties, the ALJ determined, by decision dated July 12, 1994, that after the entry of the settlement agreement, D.R.'s educational circumstances had not changed, as D.R.'s abilities had remained the same both while at CPC and while at Benedictine. (RA.17a-18a) The only change was that Benedictine now refused to provide the program that it had been providing and was now requiring the provision of additional aides at the expense of someone other than Benedictine. (RA.18a) The ALJ further found that, because parents voluntarily assumed responsibility for the costs of the aides and chose to continue D.R.'s placement at Benedictine for the 1992-93 school year despite the settlement agreement and the Board's known disclaimer of liability rather than requesting that the Board place him elsewhere, it was not the enforcement of the settlement which precluded D.R.'s needs from being met. (RA.18a) In sum, the ALJ held that the settlement must be enforced because Petitioners had failed to show that D.R.'s circumstances had changed since the entry of the settlement. (RA.18a)

Although Petitioner contends that the ALJ held that "the aide" was educationally necessary, this is a mischaracterization of the ALJ's findings. The ALJ found that aide services were necessary based upon his finding that the Benedictine staff aides were providing necessary individualized assistance consistent with D.R.'s mandated educational program as set forth in his IEP. (RA.17a) There is a difference between the assistance that was being provided by the aides provided by Benedictine which were already on staff and the need for two personal aides to assist only D.R. during all of his waking hours. Thus, the ALJ's decision should not be construed to have held that the additional 24-hour personal aides required by Benedictine were educationally necessary, as it clearly merely held that the individualized assistance that was being provided by the Benedictine staff aides as part of the program which was agreed to in the settlement were educationally necessary.

D.R.'s parents appealed this decision to the federal district court on August 29, 1994. (PA.40) The case was assigned to Judge Wolin, and by decision dated August 4, 1995, the court seemed to change the standard that it previously set in order to set aside a valid and binding settlement agreement. (PA.47) In this regard, the court stated that the settlement could be set aside if the aides were educationally necessary and that the Board, rather than the parents, would have the burden to show that the agreement should not be set aside. (PA.47-48) The Board appealed this decision to the United States Court of Appeals for the Third Circuit. The Third Circuit held that the settlement agreement was improperly voided by the district court. (PA.10)

REASONS FOR DENYING THE WRIT

The law is well settled that a petition for a writ of certiorari before this court shall only be granted for compelling reasons. R. 10. Respondents respectfully submit that Petitioner has not set forth such compelling reasons which warrant certiorari in this matter. Respondent respectfully submits that the Third Circuit has correctly decided this matter, that its decision provides for an appropriate balance between the policy considerations underlying the preservation of the validity and enforceability of settlement agreements and the importance of enforcing the provisions of the IDEA, and that there is no need to disturb the law on these issues as it currently stands.

I.

THE PETITION MISCHARACTERIZES THE THIRD CIRCUIT'S DECISION.

Petitioner contends that the Third Circuit's holding turns exclusively on the binding nature of settlement agreements and mischaracterizes the decision as one which only considers the

interests in upholding the final and binding nature of settlements while ignoring the IDEA's requirements. On the contrary, the Third Circuit's decision follows the decision of the district court in *D.R. v. East Brunswick Bd. of Educ.*, 838 F. Supp. 184 (D. N.J. 1993) (PA.14), and appropriately strikes a balance between the policy considerations underlying the preservation of the final and binding nature of settlements with the importance of upholding the IDEA's requirements.

The Third Circuit specifically applied the district court's changed circumstances test and found that the district court's subsequent decision in PA-40, rejecting the ALJ's conclusion that D.R.'s circumstances had not changed, was in error. (PA.7-8) It was further found, based upon the evidence of record, that D.R.'s circumstances did not change, since he continued to remain at the same educational level both prior to and after the entry of the settlement. (PA.8) Only Benedictine's circumstances had changed, as Benedictine determined that it would no longer provide the services that it had provided at the negotiated price. (PA-8) Although Benedictine had decided that it needed additional help with D.R.'s unchanged educational condition, this was not a change in D.R.'s educational circumstances which would warrant setting aside a valid and binding settlement agreement. (PA-8)

II.

THE THIRD CIRCUIT OPINION IS CORRECT.

A. The Third Circuit's Holding As It Relates To The Circumstances Of This Case Should Remain Undisturbed.

This case raises a question concerning the enforceability of valid and binding settlement agreements which are voluntarily entered into between parents of learning disabled children and

school boards in order to resolve educational disputes which fall within the purview of the IDEA. The IDEA, generally speaking, provides that all learning disabled children who are classified as such by a public school district are entitled to a free and appropriate public education which is specifically designed to suit their unique needs. 20 U.S.C. § 1400(c). The law is clear that, as it is implemented in the state of New Jersey, the IDEA does not require that learning disabled children receive the "best" education which can be provided or one that would maximize the child's potential, but, rather, requires that the education received grant the child the basic floor of opportunity such that the child can receive some educational benefit from the educational program which is provided by the school district. *Hendrick Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034; *M.R. v. Montville Bd. of Educ.*, 93 N.J.A.R. 2d 48. Thus, an "appropriate" education as required by the IDEA is received under circumstances where the child's educational program can provide some educational benefit to the child.

Pursuant to the IDEA, and as it is implemented in the State of New Jersey, the local school district which is responsible for providing an education to the child evaluates the child and determines whether or not the child is to be classified as learning disabled and, if so, what educational program is appropriate to suit his educational needs. N.J.A.C. 6:28-3.1; N.J.A.C. 6:28-3.2; N.J.A.C. 6:28-3.4; N.J.A.C. 6:28-3.5; N.J.A.C. 6:28-3.6; N.J.A.C. 6:28-4.1. If the parents of the learning disabled youngster disagree with the school district's determination in either of these respects, they may file for a due process hearing to be conducted by an Administrative Law Judge who will determine whether the district's recommended classification and/or educational program meets the legal standard. N.J.A.C. 6:28-2.6; N.J.A.C. 6:28-2.7. Of course, in lieu of adjudicating the dispute and having an ALJ determine what is appropriate for the child, the parties themselves are free to enter into a settlement

agreement which compromises their respective positions on what is appropriate for the child. N.J.A.C. 6:28-2.6.

In this case, Petitioners believed that CPC was inappropriate for D.R. and, contending that Benedictine was the only appropriate program for him, unilaterally and without the consent of Respondent, removed him from CPC and placed him at Benedictine. Petitioners then filed for due process to require that the Board pay for the Benedictine placement and, in mediation of the dispute, the parties entered into a settlement whereby the Board would place D.R. at Benedictine and pay the residential and tuition costs for the program D.R. was currently receiving, and parents would be responsible for any additional costs. As correctly held in *D.R. v. East Brunswick Bd. of Educ.*, 838 F. Supp. 184 (D. N.J. 1993) (PA.14), the settlement was a valid settlement which was binding on the parties and provided that the Board would pay for the tuition costs of the regular Benedictine program which D.R. was currently receiving, but would not be responsible for the payment of any additional costs, such as the costs for the 24-hour one-to-one aides which Benedictine required subsequent to the entry of the settlement.

In order to strike a balance between the important interests in preserving the finality and binding nature of settlement agreements with the interests of upholding the IDEA's requirement that learning disabled children receive an appropriate education, the district court set forth a test to determine under what circumstances parents of learning disabled children would be permitted to avoid obligations agreed to in a settlement which implicated rights under the IDEA. In this regard, the court held that where a settlement is in compliance with the IDEA at the time that it is entered into (*i.e.* the program provided is appropriate), then parents can set aside the settlement only where there has been some change in the child's educational

circumstances since the entry of the agreement. (PA.33) If parents met this initial burden to show a change in the child's educational circumstances, then the agreement could be set aside if the enforcement of such would result in the child's needs no longer being met. (PA.33)

The court then remanded the matter to the OAL for a factual determination on the issue of whether D.R.'s educational circumstances had changed after the entry of the settlement. (PA.39; PA.6) After a full hearing the ALJ found that D.R.'s educational circumstances had not changed in light of the fact that he had been at the same educational level while at CPC and while at Benedictine. (RA.17a-18a) The ALJ correctly found that the only circumstances which had changed were Benedictine's circumstances, as Benedictine had determined that it was no longer willing to provide the program that it had been providing at the time the parties entered into the settlement, and would now require additional aides to assist D.R. at an additional cost. (RA.18a)

The Third Circuit has correctly adopted this test and, contrary to Petitioner's assertions, has not left an open question as to when the parents of a learning disabled youngster may avoid a voluntarily entered settlement agreement in the interests of the IDEA. (PA.7-8)

At the time that the settlement was entered into, both parties to the settlement agreed that it was an appropriate program for D.R. and that it met the requirements of the IDEA. There had been aides assisting him provided by Benedictine as part of the regular tuition cost of the program, and D.R. was functioning well in the program. The educational program as implemented by Benedictine was appropriate in that it consisted of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as

are necessary to permit the child to receive some educational benefit from the instruction." *Board of Education v. Rowley*, 458 U.S. 176, 188-189, 1025 S. Ct. 3034, 3042 (1982).

At the time of the settlement, representatives of the school district travelled to Maryland to observe D.R. in the educational setting into which he had been unilaterally placed by his parents, neither Petitioners nor representatives of Benedictine advised Respondent of the "trial" nature of Benedictine's acceptance of D.R. into their program. At that time, Petitioners were informed by Benedictine that the level of attention might require the provision of an additional aide. Notwithstanding the information provided to Petitioners, they nonetheless entered into the settlement agreement, by which, in exchange for Respondent's agreement to assume the cost of the residential placement, Petitioners specifically agreed to absolve "the Board of any other or further costs based upon this placement, related services, or transportation in connection therewith." Thus, when this settlement was entered into, it was only Petitioners who were aware that the panoply of services provided by Benedictine at the outset might not continue as part of the program. Notwithstanding this known fact, they voluntarily agreed to assume the costs of related services beyond what the program provided, and by so doing induced Respondent into agreeing to a residential placement which, in its view, offered no greater educational opportunity for D.R. than the day placement from which Petitioners had unilaterally removed him.

No change in the child's educational needs occurred subsequent to the entry of the settlement. The only change which occurred was the fact that Benedictine determined to cease providing the services that it had been providing through its own staff and now sought to convert such services into a "related service" to be performed by additional personnel who were not its staff members, at an additional cost. Instead of rethinking

their position that Benedictine was the only appropriate program for D.R., Petitioners never relented in their position that the residential program at Benedictine was appropriate for their son, and filed a claim against Respondent seeking payment for the additional aides. As a result, throughout this litigation the Board had been placed in a position of seeking affirmance of the settlement agreement, while Petitioners have sought confirmation of that part which gave them the residential placement they had sought from the outset but allowed them to avoid their obligations under that same agreement. If the settlement agreement is not enforceable due to Benedictine's change in the program, then the Board should also be free of its concession to place D.R. there in the first place.

In sum, the original placement met D.R.'s educational needs, and those needs remained consistent. As correctly held by both the Third Circuit and the ALJ on remand, there was no change in D.R.'s educational needs which would warrant the reopening of the valid settlement which had voluntarily been entered into by the parties. To Petitioners' knowledge, Benedictine required that outside aides be substituted for its own staff. The settlement agreement voluntarily agreed to by Petitioners covered exactly that circumstance in providing that parents pay for additional costs and related services beyond the appropriate program which was being provided. While the IDEA insures appropriate educational opportunity to handicapped children, it was not meant or designed to afford their parents the opportunity to gain more than the law requires while retaining the right to seek even greater services by non-disclosure of relevant information, all at the public expense. Under the circumstances of this case, the Third Circuit's holding that the settlement must be upheld and that the parents were responsible for the payment of the cost of the aides is correct and should not be disturbed.

B. The Test Followed By The Third Circuit Provides An Appropriate Standard To Be Applied In Future Cases.

Petitioners contend that the changed circumstances test applied by the Third Circuit runs contrary to the IDEA in that it permits settlements to stand under circumstances where to do so would result in a child's inability to receive an appropriate education under the IDEA. What Petitioners fail to realize is that there are policy considerations at stake other than the IDEA. As correctly held by the Third Circuit, the test does not violate a child's right to an appropriate education under the IDEA, as the requirement of parental showing of a change in the child's circumstances is premised upon an initial determination that the agreement was in accordance with the IDEA at the time it was entered. (PA.9, n.3) Thus, the test preserves the IDEA's requirements that settlement agreements must comply with the legal requirements of the IDEA.

However, in the interests of also preserving the sanctity of settlement agreements in special education disputes, the test appropriately balances the policy considerations in upholding both the finality and binding nature of settlement agreements with a school district's obligation to comply with the IDEA by requiring that parents demonstrate a change in the child's circumstances in order to relieve themselves of obligations voluntarily agreed to in a settlement. The "changed circumstances" test requires that the handicapped child's needs are met in that it requires that the settlement comply with the IDEA at the time that it is entered. However, it also preserves the enforceability of settlements in that it requires that parents prove a change in the child's educational needs in order to set aside an agreement. As illustrated by the facts of this case, it guards against giving parents carte blanche to ignore settlements that they later find to be undesirable.

Petitioners contend that a different test should be adopted in order to "accommodate the tension between a public policy which favors the binding nature of settlement agreements and the mandate of the IDEA to ensure an appropriate education." In this regard, Petitioners argue that parents should be permitted to ignore valid settlements that they enter into when "circumstances change such that enforcement of the agreement would deny a child an appropriate education." It is respectfully submitted that this is the test that has been adopted. It appears that what Petitioners are really asking for is a test whereby *any* change in circumstances will permit parents to ignore their settlements. Such a test will not strike a balance between the two competing policy interests in this case, but will, rather, nullify the final and binding nature of settlement agreements in special education by permitting parents of learning disabled children to reopen and change the terms of their settlements which are disagreeable to them and retain those which are in their favor, simply by alleging that the *placement* which they have unilaterally chosen and insisted upon requires something more than what was contemplated at the time the settlement was entered, absent any showing that the child's educational circumstances had somehow changed or that the child requires more.

Under Petitioner's proffered test, *any* change since the entry of the settlement would be sufficient to allow parents to ignore the terms of their settlements which are unfavorable to them, irrespective of whether that change be a change in the child's educational circumstances or a change in some third party's circumstances. It is respectfully submitted that in order to permit parents to ignore the terms of their settlements in the interests of the IDEA, there must be a change in the child's educational personal circumstances which warrant a determination that the settlement which was once appropriate and in accordance with the IDEA is no longer such. Permitting the reopening of

settlements upon a mere showing that there was **any** change in **anyone's** circumstances reduces the parents' burden of proof to that which is meaningless. Under such circumstances, school boards would be stripped of the ability to enter into settlements due to the justifiable fear that some third party would have the unilateral power to render their settlement unenforceable, and settlement agreements in special education cases would be reduced to a nullity.

In order to appropriately balance the policy considerations between preserving the final and binding nature of settlements with the IDEA's requirements and avoid reducing special education settlement agreements to a nullity, a "change in circumstances" must require a change in the child himself, either in his educational needs and/or status. Any other definition of the term would not only nullify settlements in special education matters but would also leave parties to such settlements at the mercy of unknown determinations of future third parties, which serves no policy considerations underlying the IDEA.

Moreover, adopting a test which permits the reopening of settlements if at any future point in time the settlement does not comply with the IDEA ignores the fact that settlements, by their very nature, many times constitute a compromise between what each party to the underlying dispute believed to be educationally necessary and appropriate. An absolute rule which would permit the reopening of settlements in special education cases if such were found to violate the IDEA any time in the future, absent a requirement that the child's educational needs had changed since the entry of the settlement which complies with the IDEA, would reduce settlement agreements made in the context of special education disputes to a nullity. A settlement is the parties' own contract. Through their rights under the IDEA, the parties to such define what is an appropriate panoply of services designed to meet the child's needs in recognition of the fact that the

contract reflects a compromise from what each party believed a full litigation of the issue might provide. Only if a change in the child's educational circumstances makes the settlement terms no longer appropriate to meet the educational needs of the child can either party avoid their contract. Moreover, in such cases, both parties should be permitted to avoid their obligations under the agreement and find a different appropriate placement for the child. The parents should not have carte blanche to ignore those parts of the agreement which are unfavorable to them while holding the board of education to its obligations which are favorable to parents.

In sum, the test set forth by the district court and adopted and applied by the Third Circuit is the only practicable test which serves to balance the interests between the IDEA and the finality of settlements. As a result, the Third Circuit's opinion should stand undisturbed, as it answers the question of when parents can reopen their settlements in special education cases in a way which preserves both the sanctity of settlements while ensuring that the IDEA's requirements are satisfied.

CONCLUSION

For all of the foregoing reasons, this court should not grant a writ of certiorari.

Respectfully submitted,

MARTIN R. PACHMAN
Counsel of Record
LISA A. THOMAS
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(732) 780-5590

APPENDIX A — NOTICE OF ADJOURNMENT DATED FEBRUARY 3, 1992

CASE NUMBER: *92-4444*

NOTICE OF ADJOURNMENT

Re: *D.R.* **V.** *East Brunswick*

At the mediation conference held in the above-cited matter, the parties agreed to the following:

The following adjournment will be considered an agreement when the East Brunswick Board of Education approves it:

It is agreed by and between D.R. by his parents M.R. and B.R., and the East Brunswick Board of Education that:

1) *The East Brunswick Board of Education will compensate placement costs at the Benedictine School for D.R. at an annual rate of $27,500 prorated for the balance of the 1991-2 school year including summer of 1992 and beginning January 1, 1992;*

2) *For the 1992-93 school year the Board will contribute 90% of any increase over the 1991-92 rate.*

3) *The Board will be absolved of any other or further costs based upon this placement, related services, or transportation in connection therewith.*

4) *This placement is in settlement of Docket #92-4444 and is without prejudice to the position of either party regarding the need for residential placement.*

Appendix A

5) *Inasmuch as D.R. has been placed at Benedictine school by parents the following issues will be resolved:*

   a. *D.R. will be made available by parents for completion of the re-evaluation*

   b. *D.R. and parents understand that the Board has no ability and responsibility to evaluate the residential component of the program at Benedictine School.*

All parties agree to implement the provisions and reconvene as stated above. Should there be failure to implement the above within the timelines specified, either party may contact the mediator at (609) 292-0147.

Parent: s/ illegible

School: s/ illegible

This adjournment was developed at a conference conducted by s/ illegible

Date 2/3/92

APPENDIX B — PROGRAM COST SHEET DATED APRIL 7, 1992

1992/93 ESTIMATES

Program Cost Sheet
School Year 1992 – *93*

Child's name: *Daniel Rosenberg* Enrollment Date: ____

County of Residence: *NJ* Age: __ Handicapped Code: 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 12

II. School Name: *Benedictine School* Program Name: ____

Address: *RR 1, Box 182, Ridgely, MD 21660*

Contact Person: *Sr. Jeannette Murray, OSB* Phone Number: *(301) 634-2112*

Day/Residential Length of School Year: *10* months Dates of Program From: __ __ To: __ __

Total Number of Calendar Days in Program: *282* days

III. The following services are requested in order that the above-named child might achieve the objectives specified on both the educational profile portion of the IEP and the residential treatment program (if applicable).

Appendix B

Services Requested	* * *	VII Total Services
A. 100 Education and Basic related services (A)		*12976*
* * *		
B. 270 Special Classroom Aide		*16640*
* * *		
C. 320 Room and Board		*16231*
* * *		
340 Special Aide – Residential Program		*16640*
* * *		
	Total Services Req.	*62487*

IV. I hereby certify the above services will be provided the above-named child at the cost indicated in Part III.

SIGNED: Sr. Jeannette Murray DATED: 4-7-92
Director Program/School

APPENDIX C — DECISION OF THE STATE OF NEW JERSEY FOR THE OFFICE OF ADMINISTRATIVE LAW DECIDED JULY 12, 1994

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 12199-93

AGENCY DKT. NO. 93-5095

REMAND OF OAL DKT. NO EDS 10062-92

D.R., BY M.R. AND B.R., HIS PARENTS AND GUARDIANS,

Petitioners,

v.

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent.

Herbert Hinkle, Esq., for petitioners

Martin Pachman, Esq., for respondent

Record Closed: June 22, 1994 Decided: July 12, 1994

BEFORE **JOHN R. TASSINI**, ALJ:

Appendix C

STATEMENT OF THE CASE

Petitioner D.R. is a twenty-year-old multiply handicapped individual whose parents, unilaterally, during the 1991-92 school year, removed him from a school in New Jersey and placed him in the Benedictine School in Maryland. D.R.'s parents then demanded that the respondent East Brunswick Board of Education ("BOE") pay for the costs related to that placement. One-to-one aides were among the "related services" Benedictine provided for some of its students, although, at first, they were not provided to D.R. The parties entered into a settlement agreement whereby the BOE accepted responsibility for certain aspects of the Benedictine placement and whereby the BOE was "absolved of . . . further costs based upon . . . related services." Prior to the 1992-93 school year, Benedictine determined that one-to-one aides were necessary for D.R. and made payment for same a condition of D.R.'s placement there for that school year. D.R.'s parents demanded that the BOE make payment for the aides; however, based upon the settlement agreement, the BOE disclaimed responsibility. Knowing the BOE's position, D.R.'s parents continued his placement in Benedictine, *i.e.*, during the 1992-93 school year, thereby incurring liability for the cost of the aides.

In earlier cases in the Office of Administrative Law ("OAL"), D.R.'s parents alleged that the "one-to-one" aides were educationally necessary and demanded that the BOE pay for the aides. Consistent with the BOE's position, OAL decisions concluded that the BOE was not liable for the aides and D.R. then appealed to the United States District Court.

Pursuant to the opinion and order of remand entered in *D.R., by his parents and guardians, M.R. and B.R., v. East Brunswick*

Appendix C

Board of Education, Civil Action No. 93-560, U.S.D.C., N.J. (November 23, 1993), the following issues are to be resolved here: (1) After the parties entered into the settlement agreement, in a case previously filed for D.R. in the OAL, was the issue of the necessity of one-to-one aides raised? (2) If the issue was raised, during relevant times, were the one-to-one aides educationally necessary and consistent with the Individuals with Disabilities Education Act ("IDEA")? *See* 20 *U.S.C.A.* §1400 *et seq.* (3) If the one-to-one aides were educationally necessary, after the parties entered into the settlement agreement was there a change in D.R.'s circumstances such that enforcement of the settlement agreement would have resulted in his "educational needs . . . no longer being met" and such that the BOE should be ordered to pay for the aides?

PROCEDURAL HISTORY AND FINDINGS OF FACT

D.R., whose date of birth is March 22, 1974, suffers from cerebral palsy and mental retardation and he has been classified as multiply handicapped. When not away in school, D.R. resides with his parents in the Township of East Brunswick. *See* P-1.

Until January 1992, D.R. resided with his parents and was placed in day schools such as the Cerebral Palsy Center ("CPC") in Middlesex County, consistent with his individualized education program ("IEP") developed by the East Brunswick school system Child Study Team ("CST"). *See* P-3, 20 *U.S.C.A.* §1401(20) and *Fuhrman v. East Hanover Bd. of Ed.*, 993 *F.*2d 1031, 1035 (3d Cir. 1993).

In the CPC, D.R. was in a small, self-contained class except for music and physical training classes, to which he was accompanied by a member of the CPC staff. During D.R.'s

placement in the CPC, D.R. displayed characteristics including the following: Generally, he could pull on clothing but he could not use fasteners and the like. He could not independently and appropriately use a toilet and, after using the toilet, he could not independently and appropriately wipe and clean himself and then independently and appropriately dress himself. He could not independently and appropriately feed himself; he "shovelled" his food into his mouth, from which it was spilled and/or regurgitated. That is to say, to the extent D.R. was could be educated, his educational needs were met by the CPC.

D.R's parents unilaterally removed him from the CPC and, beginning January 7, 1992, unilaterally placed him in the Benedictine School in Maryland. *See* P-3.

Nancy McCloy, Benedictine's "educational director," was involved in Benedictine's decision to admit D.R. and she was responsible for assuring that all D.R.'s IEP services were provided. Ms. McCloy held the opinion that, with a student like D.R., a period of "living and working" was necessary to determine his needs, and whether D.R.'s placement in Benedictine should continue. Consistent with Benedictine's normal practice, D.R.'s first five weeks (after D.R.'s January 7, 1992 admission) constituted a "trial" period, after which the placement might include modifications, additional related services, etc., and it is most significant that Ms. McCloy agreed that *the subject aides were an "additional related service."* D.R's parents were made ware of this. However, Benedictine did not make the BOE aware of the "trial" nature of the placement.

During the five-week trial period at Benedictine, D.R. displayed characteristics including those displayed at the CPC and described above. A member of Benedictine's dormitory staff

was responsible for assisting D.R., so that, initially, he was properly dressed and that after use of the toilet, he was properly wiped and cleaned and redressed. Educationally, D.R. could not stay "on task" and, generally, if left to himself, D.R. would "look more retarded than he was." For "educational reasons," given D.R.'s characteristics, and for "safety," Benedictine "practically" provided one-to-one-aide assistance to D.R.; however, Benedictine made no specific decision to assign a one-to-one aide to D.R. and it did not notify anyone that such an aide was necessary.

D.R.'s parents filed a due process claim with the New Jersey Department of Education wherein they demanded that the BOE pay for D.R.'s placement at Benedictine, and on February 3, 1992, that case was resolved when D.R.'s parents and the BOE's attorney entered into a settlement agreement (approved by the BOE on February 27, 1992) which governed the 1991-92 and 1992-93 school years and stated the following:

> 1) *The East Brunswick Board of Education will compensate placement costs at the Benedictine School for D.R. at an annual rate of $27,500 prorated* for the balance of the 1991-2 school year including summer of 1992 and beginning January 1, 1992;
>
> 2) For the 1992-93 school year the Board will contribute 90% of any increase over the 1991-92 rate.
>
> 3) *The Board will be absolved of any other or further costs based upon* this

placement, *related services*, or transportation in connection therewith.

4) This placement is in settlement of Docket #92-4444 and is without prejudice to the position of either party regarding the need for residential placement.

5) Inasmuch as D.R. has been placed at Benedictine school by parents the following issues will be resolved:

   a. D.R. will be made available by parents for completion of the re-evaluation

   b. D.R. and parents understand that the Board has no ability and responsibility to evaluate the residential component of the program at Benedictine School.

[R-1; emphasis added.]

By the end of the five-week trial period, *i.e.*, by about mid-February 1992, Ms. McCloy felt that D.R. had "found a niche" and Benedictine had determined that D.R.'s placement there was appropriate and made this known to D R.'s parents. Benedictine had not yet assigned a one-to-one aide to D.R. or determined that one-to-one aides would be necessary and a condition of continued placement. When Suzanne Sink, the BOE's school psychologist and a member of the CST, observed D.R. in Benedictine on February 13, 1992, Benedictine did not advise her that one-to-one aides would be necessary.

Appendix C

In February, the spring, and July of 1992, Merry Madover, a psychologist, teacher/consultant and member of the BOE's CST assigned to D.R., visited Benedictine, spoke to its staff and observed D.R. Ms. Madover made findings and held opinions, including the following: D.R. was better off at the CPC, where he was in a smaller class and had more related services available, compared to Benedictine, whose curriculum was too "academic" and not sufficiently "vocational" for D.R. However, Benedictine had a "caring" staff and, although D.R. was "rocking" in class and "not that involved in discussions," and occasionally wandered off and "disappear[ed]" from his assigned place, he had made a "good adjustment" and was "basically on track." Ms. Madover further acknowledged that with the aide, D.R. was eating appropriately. Overall, D.R.'s behavior was not substantially different than when he was at the CPC. Benedictine's staff spoke to Ms. Madover about D.R., but told her only that D R. had "made a good adjustment" and was accepted there. Benedictine did not tell Ms. Madover of any "trial" placement or the like. *See* P-14 and P-15.

In April 1992, Robert Sisco, a social worker and member of the BOE's CST assigned to D.R., also visited Benedictine, spoke to its staff and observed D.R., and he reported to the school system that D.R. "needed a good deal of one to one supervision to accomplish work in the classroom" and that "[t]hose working with [D.R.] in the dormitory at Benedictine noted that *he needs one to one supervision* to complete activities of daily living such as tooth brushing and bathing." P-3; emphasis added.

By Benedictine's letter dated April 9, 1992, and its "Program Cost Sheet, School Year 1992-93," "Estimate," it made the BOE aware for the first time of its position that a "Special Classroom Aide" at a cost of $16,640 and a "Special Aide, Residential

Program" at a cost of $16,640 were necessary for D.R. to "achieve the objectives specified on both the educational profile portion of the IEP and the residential treatment program." R-2.

By the BOE's letter dated May 26, 1992, it requested more information relative to the aides and, in response, in a letter dated June 18, 1992, Benedictine stated that it "strongly *recommend[ed]* the need for 1:1 aide assistance." P-5; emphasis added. Also at about that time, Benedictine advised D.R.'s parents for the first time that the aide was a *requirement* for D.R.'s continued placement there.

Benedictine's evaluations, reports, etc., for July 1992 documented the following: It was "necessary to constantly reinforce survival signs/words, safety procedures/cautions"; D.R. "need[ed] 100% constant monitoring"; D.R. "require[d] complete assistance"; "Without a monitor, [D.R.] ha[d] accidents," etc. P-6, P-7 and P-8.

By July 1992, Benedictine had notified the BOE that it "definitely [would] not take [D.R.] back in September [1992] without additional help [a one-to-one aide, at an additional cost]." *See* P-10 and P-12.

D.R.'s parents demanded that the BOE make payment for the aide; the BOE refused; and, in August 1992, D.R.'s parents, on behalf of D.R., filed with the New Jersey Department of Education a "Petition for Hearing" wherein they stated, *inter alia*, that "the [Benedictine] staff . . . determined that *D.R. require[d] the services of a 1 to 1 aide* during his waking hours . . . in order *to benefit from [Benedictine's] program*, and . . . further determined that unless the aide [was] provided D.R. [could] not continue in [Benedictine]" (emphasis added). The

petition demanded a "finding that D.R. [was] in need of residential services and a 1 to 1 aide" and "[a]n order requiring [the BOE] to pay for the cost of residential placement . . . including the cost of an aide, and . . . such related services as may be educationally necessary."

Howard Margolis, Ed.D., a special education consultant retained on behalf of D.R., observed D.R. at the CPC and Benedictine and found the following: D.R. continues to have difficulty keeping his balance, and sometimes falls while standing or sitting. D.R. has difficulty communicating. D.R. lacks the ability to do things like opening a door. Some of D.R.'s activities, such as eating, cause other people to be "appalled" or "nauseous." D.R. needs assistance "in just about every area of function that you can think of in life." However, with a one-to-one aide, D.R. was "happier," he was "eating better" and "wasn't vomiting to the degree he did prior," he "looked so much neater," etc. Dr. Margolis gave the opinion that, at Benedictine, with the one-to-one aide, D.R. has made "[f]antastic, marvelous progress." However, when Dr. Margolis was asked for information on which he based his opinion that D.R. had made "progress," he was vague and incredible. When pressed, Dr. Margolis testified that an example of an "experiment" that allowed him to quantify D.R.'s "progress" "*might be* taking a bottle and putting it into a box and perhaps putting a cap on it and closing the box" (emphasis added). When D.R. was asked to repeat such a task, with an aide prompting, correcting and reinforcing him, D.R. succeeded about 90 percent of the time; without the aide, D.R. succeeded about 20 percent of the time. Even allowing that education is an "inexact science," Dr. Margolis was substantially incredible in his description of the basis for his opinions, and his opinions themselves are rejected as incredible.

Appendix C

D.R.'s condition, classification and personal circumstances were substantially the same before and after the settlement agreement was entered into. (Although D.R. experienced some brief regression at Benedictine, that was attributable to, *e.g.*, illness or ambitious attempts at training, and not attributable to a change in his personal circumstances or characteristics.) Benedictine's services, including the one-to-one aide provided during the relevant 1992-93 school year, were aimed at training D.R. in "lifeskills," *e.g.*, feeding himself, shaving, brushing his teeth, showering, etc., and were also aimed at training him in vocational skills. However, similar to his circumstances before entry into Benedictine, even after the aforementioned constant monitoring, "cueing" and assistance at Benedictine, D.R. could not independently and appropriately dress himself, eat, use the toilet and bathe; D.R. regularly soiled his clothing; D.R. occasionally urinated and/or defecated in inappropriate places; and, vocationally, D.R. could push a vacuum cleaner back and forth, but only with an aide constantly at hand would he do so consistently. (Further, it is probable that, in the forseeable future, D.R. will not gain and/or retain skills necessary for self-sufficiency.)

The Department transmitted the parents' petition, etc., to the OAL where, on August 27, 1992, it was received and docketed as EDS 6529-92. After a hearing with testimony from both parties, M. Kathleen Duncan, A.L.J., found and concluded that, under the parties' (above-noted) valid and enforceable settlement agreement, the "1 to 1 aide" was only a "related service" and, therefore, excluded from the "rate" for which the Board was responsible. (That is to say, pursuant to the agreement, the BOE was "absolved" from responsibility for the cost of the aide.) Therefore, Judge Duncan dismissed the parents' claim (petition). The parents' motion for reconsideration resulted in

oral argument on November 17, 1992, and the same conclusion by Judge Duncan, which was set forth in her letter/decision dated December 14, 1992.

In D.R.'s attorney's letter (petition for relief) of December 21, 1992, it was again alleged that D.R. "[was] in need of . . . a 1 to 1 aide," etc., and it was contended that in the above-noted decisions, Judge Duncan "did not examine [D.R.'s] educational needs and dealt only with the [settlement] agreement." On December 23, 1992, that petition was filed with the Department and the Department forwarded the matter to the OAL, where, on December 31, 1992, it was filed and docketed as EDS 10062-92. By the BOE's attorney's letter dated January 6, 1993, the BOE, based upon ALJ Duncan's decisions, moved for dismissal of the petition as barred by operation of the doctrine of *res judicata*. On January 19, 1993, the Board's motion was argued by way of a telephone conference call. In my decision, dated January 19, 1993, I concluded that the claim for relief was essentially the same as that in the case docketed as EDS 6529-92 and I granted the BOE's motion.

My decision was appealed, resulting in the above-noted District Court opinion and order of remand to the OAL, and on December 28, 1993, the remanded case was received in the OAL and docketed as EDS 12199-93. On February 25, 1994, the case was subjected to a conference. At the attorneys' mutual request (to accommodate one of D.R.'s witnesses and because of settlement negotiations), the hearing scheduled for March 15, 1994, was adjourned to April 25 and May 31, 1994. On April 25 and May 31, 1994, the case was heard and, at the parties' request, the record was kept open until June 22, 1994, to allow the filing of closing memoranda.

Appendix C

CONCLUSIONS OF LAW

The demand here is for payment of the cost of the one-to-one aide for the 1992-93 school year.

In the District Court's opinion and order, the following was held: The parties' settlement agreement constituted a "binding final resolution of [the petitioners' first] action." The settlement agreement is "clear and unambiguous." The "aide was not one of the services enumerated in the program cost sheet for 1991-92" for which, pursuant to the settlement agreement, the BOE was financially responsible, *i.e.*, the aide is "a new service for 1992-93, outside of the array covered." It must be "presume[d] that at the time the [settlement] Agreement was entered, the services and/or program agreed to meet [D.R.'s] educational needs and, therefore, was in compliance with IDEA." "[U]nless it is found that [D.R.'s] circumstances have changed, [such that] enforcing the terms of the settlement [agreement] would violate IDEA," "the [settlement] Agreement between D.R.'s parents and the Board is binding and shall not be set aside." In the OAL case docketed as EDS 6529-92, D.R. "did raise the issue of [the] educational necessity" of the aide and, "[w]hile the first petition did not explicitly state there was a change in circumstances, it did request an order finding *inter alia* that an aide was necessary" and it must be concluded that this was "sufficient to constitute a change in circumstances claim"; however, the petitioners "never received the opportunity to be heard on these issues."

(1) **I CONCLUDE** that, after the parties entered into the February 1992 settlement agreement, the petition in the case, bearing OAL docket number EDS 6529-92, *did* raise the issue of the necessity of a one-to-one aide.

(2) During the 1992-93 school year, the one-to-one aide *was* provided consistent with D.R.'s IEP and in an attempt to train D.R. to be self-sufficient in "lifeskills" and vocationally, *i.e.*, educate D.R. Therefore, **I CONCLUDE** that the one-to-one-aide services provided during the 1992-93 school year were educationally necessary and consistent with the IDEA.

(3) D.R.'s parents unilaterally withdrew D.R. from the CPC and unilaterally placed him in Benedictine where *the one-to-one aides were a "related service."* D.R.'s parents then settled their case wherein they had demanded payment relative to placement in Benedictine, in doing so, "*[t]he Board [was] absolved of any other or further costs based upon . . . related services.*" R-1; emphasis added.

Settlement agreements, an efficient means of resolving litigation, are favored as a matter of policy. They are enforceable contracts. If this were not so, parties would not so settle their differences and the number of cases requiring trial would be unmanageable. The District Court has held that the parties' settlement agreement is dispositive of the issues contained therein, citing *Farrar v. Hobby*, 121 *L.Ed.*2d 494, 113 *S.Ct.* 566, 506 *U.S.* __ (1992); *Eggers v. Bullitt County School District*, 854 *F.*2d 892 (6th Cir. 1988); *Shelly C. v. Venus Independent School District*, 878 *F.*2d 862, 864 (5th Cir. 1989), *cert. den.*, 493 *U.S.* 1024, 110 *S.Ct.* 729, 107 *L.Ed.*2d 748, *reh'g den.*, 494 *U.S.* 1013, 110 *S.Ct.* 1312, 108 *L.Ed.*2d 488 (1990); and *Barlow-Grensham Union High School District No. 2 v. Mitchell*, 940 *F.*2d 1280 (9th Cir. 1991).

After the parties entered into the settlement agreement and during the 1992-93 school year, D.R.'s diagnoses, conditions, classification, needs, etc., *i.e.*, his personal circumstances, did

not change: D.R. remained (and remains) multiply handicapped and mentally retarded and unable to independently and appropriately care for himself. What did change was that Benedictine made payment for the "related service" of the one-to-one-aides a condition for D.R.'s placement there for the 1992-93 school year and the parties' settlement agreement was dispositive of that change in circumstance. The BOE was "absolved" of responsibility for the cost of the aides.

Before the start of the 1992-93 school year, knowing of the terms of the settlement agreement and the Board's consequent disclaimer relative to the cost of the aides, D.R.'s parents chose continued placement of D.R. in Benedictine and, thereby, incurred liability for the cost of the aides. They did this instead of requesting that the BOE return D.R. to the CPC or place him elsewhere. That is to say, **I CONCLUDE** that enforcement of the settlement agreement would not have resulted in D.R.'s needs no longer being met.

In the context of this case, especially given the parties' settlement agreement, **I CONCLUDE** that the demand that the BOE pay for the cost of the aides for the 1992-93 school year must be **DISMISSED WITH PREJUDICE.**

This decision is final pursuant to 20 *U.S.C.A.* §1415(e) and 34 *C.F.R.* §300.509 (1993) and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States. 20 *U.S.C.A.* §1415(e)2, 34 *C.F.R.* §300.511. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Division of Special Education.

July 12, 1994
DATE

s/ John R. Tassini
JOHN R. TASSINI, ALJ

Appendix C

EXHIBITS

Petitioners' Exhibits:

P-1 Psychological Evaluation by East Brunswick Public Schools, Department of Special Education, dated 2-13-92

P-2 Memorandum of East Brunswick Public Schools, Department of Special Education, dated 2-19-92

P-3 Social Assessment by East Brunswick Public Schools, Department of Special Education, dated 4-3-92

P-4 Letter from East Brunswick Public Schools to Benedictine, dated 5-26-92

P-5 Letter from Benedictine to East Brunswick Public Schools, Department of Special Education, dated 6-16-92

P-6 Classroom Evaluation by Benedictine, dated 5-22-92

P-7 Progress Report and Request for 1:1 Aides by Benedictine, undated

P-8 "Dorm" Report by Benedictine, undated

P-9 Case Note by East Brunswick Public Schools, Department of Special Education, dated 7-2-2

P-10 Memorandum by East Brunswick Public Schools, Department of Special Education, dated 7-14-92

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P-11 Case Note by East Brunswick Public Schools, Department of Special Education, dated 2-10-93

P-12 IEP 1993-94 Annual Review by East Brunswick Public Schools, Department of Special Education, July 1993

P-13 "Professional Vita," Howard Margolis

P-14 Case Note by East Brunswick Public Schools, Department of Special Education, dated 2-13-92

P-15 Case Note by East Brunswick Public Schools, Department of Special Education, dated 7-13-92

Respondent's Exhibits:

R-1 "Notice of Adjournment" (settlement agreement), dated 2-3-92

R-2 Letter from Benedictine to East Brunswick Public Schools, dated 4-9-92, and "1992/93 Estimated" "Program Cost Sheet [for the] School Year 1992-93," dated 4-7-92